United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2125

TO BE ARGUED BY:
NORMAN S. HATT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel
THOMAS F. BYRNES :

Petitioner-Appellant :

-against- :

HAROLD J. SMITH, Superintendent
Attica Correctional Facility :

Respondent-Appellee :

- -x

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P/S

DOCKET NO. T-4950

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on June 26, 1975 by the Honorable Jack B. Weinstein, United States District Judge, Eastern District of New York. The order and opinion are unreported and are reproduced at pages A-1 through A-3 of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

THE OPINION AND ORDER BELOW

On June 26, 1975 the United States District Court for the Eastern District of New York (Weinstein, U.S.D.J.) entered an order dismissing the petition and filed its memorandum of decision (See complete Memorandum and Order, Appendix pp. A-1 to A-3). The court held that because of the disturbances created by the appellant, he suffered no constitutional violation by being excluded from his trial. The court ruled that the appellant's constitutional claims had been fully considered by the state courts.

THE ISSUES PRESENTED

1. Were the appellant's constitutional rights violated when he was excluded from a portion of his trial?
2. If it was proper to exclude the appellant, did the trial court have a duty to provide him a means to hear the testimony and communicate with his counsel?
3. Has the appellant exhausted all his state remedies?
4. Was the District Court bound by the rulings of the state courts?

STATEMENT OF THE CASE

The appellant was convicted on January 4, 1972, after trial in the County Court of Nassau County, of the crimes of rape, sodomy, and incest and was sentenced to a term of 8 1/3 to 25 years imprisonment. His judgment of conviction was confirmed by the Appellate Division for the Second Judicial Department, 40 A.D.2d 941, and by the Court of Appeals, 33 N.Y.2d 343.

Thereafter, the appellant sought a Writ of Habeas Corpus in the United States District Court for the Eastern District before the Hon. Jack B. Weinstein, District Judge (United States of America ex rel Thomas Byrnes v. Harold Smith, Superintendent of the Attica Correctional Facility, 74-C-683). As to the issue of the constitutional propriety of the appellant's exclusion from the courtroom, the Court denied issuance of the Writ at an ex parte hearing on the ground of failure to exhaust state remedies (page 13 of transcript of proceeding before the Hon. Jack B. Weinstein, May 3, 1974). The appellant was subsequently denied a Certificate of Probable Cause by the United States Court of Appeals for the Second Circuit (74-8179, July 24, 1974).

Pursuant to the suggestion of the Eastern District Court, the appellant brought a motion to vacate his judgment of conviction in the County Court of Nassau County, in which he raised the issue of the propriety of his exclusion from the courtroom. The motion was denied by an order entered October 21, 1974. A subsequent motion to the Appellate Division for the

Second Judicial Department for leave to appeal from the order of the County Court was denied by an order dated January 24, 1975.

The appellant then brought a second petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District, in which he raised the issue of the propriety of his exclusion from the courtroom (United States of America ex rel Thomas F. Byrnes v. Harold Smith, Superintendent, Attica Correctional Facility, 75-C-721). The petition was denied by an order dated June 26, 1975 (Weinstein, U.S.D.J.). By an order dated July 3, 1975, permission to reargue was denied. On July 28, 1975, the Hon. Jack B. Weinstein issued a Certificate of Probable Cause for appeal to this court.

STATEMENT OF FACTS

On January 4, 1972, the appellant was convicted after trial in the County Court of Nassau County (Altimari, J.) of the crimes of rape, sodomy and incest and was sentenced to a term of 8 1/3 to 25 years imprisonment.

At the trial the complainant, Tamara Byrnes, the appellant's daughter, then eleven years of age, testified that on two occasions, in November 1970 and March 1971, she and her father went to the home of one Gene Abrams, where Abrams photographed them in the nude engaging in various sexual acts. A series of photographs, produced from negatives seized at the Abrams house and admitted into evidence, depicted an adult male and female engaging in acts of intercourse and sodomy.

After the appellant's daughter was called as a witness, the trial judge excluded the appellant from the courtroom during her testimony because of what he characterized as disruptive behavior calculated to intimidate the witness. The appellant contended that the exclusion was an accommodation to the witness and an impermissible punishment for his prior disruptive behavior, all in violation of his right to confront the witness against him.

Prior to the incident which purports to be the reason for his exclusion, the appellant had shouted out at various times that he was taking drugs (A48; T377)*, insulted the

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*Numbers in parentheses refer to page numbers of the appendix and page numbers of the trial transcript, respectively.

court (A86-A89; T415-T418) and used abusive language (A61-A62; T390-T391). While the defendant was physically subdued on one of these occasions (A86-A89, T415-T418), he was not excluded as a result of any of those incidents, nor was he excluded for any conduct subsequent to his being removed from the courtroom.

At page 420 (A91) the record indicates that when the appellant's daughter entered the courtroom something took place which required him to be restrained. Judge Altimari remarked that what had taken place was an assaultive burst towards the witness designed to intimidate her (A92, A94; T421, T423). The Court then recessed for the day with the thought that the appellant would not be in the courtroom when the witness testified (A95; T424).

Counsel for the appellant then made a motion for a mistrial on grounds that when the complaining witness entered the courtroom she had been accompanied by a policewoman named Hahn, an act which improperly conveyed to the jury that the witness needed protective custody (A98; T427). The Court denied the motion saying the policewoman was there solely to put Tamara Byrnes at ease and that the day before the little girl "sort of clung" to Hahn (A99; T428).

At this point the appellant yelled out:

> Bullshit. She's the one that's trying to take the kids away from my wife too, she's the one that's got the charges in Queens, Hahn. She's trying to take the kids away from my wife (A99; T428).

While this outburst was improper, the appellant's statement was true. This court may take judicial notice of the fact that Policewoman Hahn of the Juvenile Aid Bureau was the petitioner

in a neglect proceeding filed against the appellant in the Queens County Family Court entitled In re Byrnes Children, which had as its purpose the removal of the Byrnes children from the custody of their parents.

The Court then recessed for the day and asked for authority to help it make a judgment whether to proceed the next day with the appellant shackled or with him absent (A100; T429). The Court concluded it was of the opinion that not only would the appellant disrupt the trial but would intimidate the witness (A100; T429).

The next day argument was heard on whether the appellant should be allowed to be present when the witness testified (A113; T442). The Court believed that his outburst had been a deliberate attempt to intimidate the witness (A114; T443). Counsel responded by stating his client wanted another chance and that he promised to behave (A114; T443), if allowed to return to the courtroom. The Court stated that counsel's position was inconsistent with the appellant's prior concern about traumatizing the witness (A120; T449). The Court then went into chambers, where it asked Tamara what she wanted him to do, and she replied that if her father were in the courtroom she would not go in (A116; T445).

Upon returning to the courtroom, counsel reiterated his client's claim that he had been under the influence of drugs on the day of the big outburst (A117; T445) and assured the Court that the appellant was now lucid and that there would be no further outbursts (A118-A119; T447-448). Counsel stated that if necessary his client would agree to be bound and gagged in order to remain

in the courtroom (A118-A119; T447-T448). The Court, however, excluded the appellant in an opinion read from a prepared text (A119; T448).

Defendant was then held in a separate room, but no provision was made for him to hear the testimony of the complaining witness, nor was any direct means of communication with his attorney provided. Defendant's only link with the courtroom was the court's agreement to allow frequent recesses and to permit messages to be carried to and from defendant (A125-A126; T454-T455).

ARGUMENT

POINT ONE

THE APPELLANT WAS IMPROPERLY EXCLUDED FROM THE COURTROOM

The confrontation clause of the Sixth Amendment, which is obligatory upon the States (Pointer v. Texas, 380 U.S. 400), provides that an accused has the right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370. While a defendant may lose this right by disruptive conduct, Illinois v. Allen, 397, U.S. 377, the appellant herein had not engaged in conduct sufficient under the guidelines of Allen to cause forfeiture of his right. The appellant was not excluded to preserve the integrity of the trial, but to punish him for prior obstreperous conduct and to accommodate the complaining witness. Exclusion for these reasons violated his constitutional right of confrontation.

Prior to the incident which purports to be the reason for the appellant's exclusion, he had shouted out at various times that he was taking drugs (A 48, T 377); insulted the court (A 86-A 89; T 415-T 418); and used abusive language (A 61-A 62; T 390-T 391). While the appellant was physically subdued on one of these occasions (A 86-A 89; T 415-T 418), he was not excluded as a result of any of those incidents, nor was he excluded for his conduct subsequent to his being removed from the court.

At page 420 (A 91) the record indicates that when the appellant's daughter entered the courtroom, he engaged in disruptive behavior which required him to be restrained. Judge Altimari stated that what took place was an "assaultive burst" towards

the witness designed to intimidate her (A 92, A 94; T 421, T 423). The Court then recessed for the day with the thought that the appellant would not be in the courtroom when the witness testified (A 95; T 424).

Counsel then made a motion for a mistrial on grounds that when the complaining witness entered the courtroom, she was accompanied by a policewoman named Hahn, which improperly conveyed to the jury that the witness needed protective custody (A 98; T 427). The court denied the motion saying Hahn was there solely to put Tamara Byrnes at ease and that the day before the little girl "sort of clung" to Hahn (A 99; T 428).

At this point the appellant yelled out:

> Bullshit. She's the one that's trying to take the kids away from my wife too, she's the one that's got the charges in Queens, Hahn. She's trying to take the kids away from my wife.(A 99; T 428)

While the outburst was not proper, the appellant's statement was accurate. This Court can take judicial notice that Policewoman Hahn of the Juvenile Aid Bureau was the petitioner in a neglect proceeding in Queens Family Court filed against the appellant and his wife entitled In re Byrnes Children which had as its purpose the removal of the Byrnes children from the custody of their parents. Under the circumstances the appellant's outburst at this point is quite understandable in view of the Court's statement and its apparent unawareness of Hahn's real status in the case.

The Court then recessed for the day and asked for authority to help it make a judgment whether to proceed the next day with the appellant shackled or with him absent (A 100; T 429). The

court concluded it was of the opinion that the appellant not only would disrupt the trial but would intimidate the witness (A 100; T 429).

The next day argument was heard on whether the appellant should be present when the witness testified (A 113; T 442). The court believed that the appellant's outburst was a deliberate attempt to intimidate the witness (A 114; T 443). Counsel responded by stating his client wanted another chance and promised to behave (A 114; A 449). The court replied that counsel's position was inconsistent with the appellant's prior concern about traumatizing the witness (A 120; T 449). The court then went into chambers where it asked Tamara what she wanted him to do, and she replied if her father werepresent, she would refuse to enter the courtroom (A 116; T 445).

Upon returning to the courtoom, counsel reiterated that his client claimed to be under the influence of drugs taken at the jail on the day of the big outburst (A 117; T 446), and assured the court that the appellant was now lucid and that there would be no further outbursts (A 118-A 119; T 447-T 448). If necessary, his client should be bound and gagged but left in the courtroom (A 119; T 448). Counsel strenuously urged that it was necessary that the appellant at least be present with one hand free to write notes to him when Tamara was testifying in order that he might put in a proper defense for his client (A 119; T 448). Nevertheless, thecourt excluded the appellant in an opinion read from a prepared text (A 119; T 448).

Error of constitutional dimension was committed because, after the appellant's promise to maintain courteous conduct, and his offer to submit to binding and gagging, his exclusion from

the trial was neither necessary nor proper. The appellant's exclusion under the circumstances here did not comport with the guidelines for exclusion of unruly defendants sanctioned by the United States Supreme Court in Illinois v. Allen, supra.

In Allen,

> "The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, 'When I go out for lunch-time, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The voir dire examination then continued and the jury was selected in the absence of the petitioner.
>
> "After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court

> during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case. The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witness from the courtroom. The [petitioner] protested this effort on the part of his attorney saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F2d at 233-234. After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identi-ifcation. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel. (emphasis added) Id. at 339-341.

The difference between the treatment of the defendant in Allen and the treatment of the appellant is critical. In the judge's order (A 125; T 454) he directed that the appellant be removed from the courtroom solely during Tamara's testimony. And while the appellant could reclaim his right to be present on a promise of good conduct, it is clear he could not do so until after the witness had finished her testimony. This violated the mandate of Allen, for it held at page 343 that

> the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (emphasis added)

Unlike Allen where the defendant was exluded immediately after the disruptive incident, the court in the present case recessed for the day and banished appellant on the following day even though the appellant by this time was calm and his counsel offered assurances that his client would now behave properly (A 114, A 118-A119; T 443, T 447-T 448). Counsel for appellant presented a credible explanation for his prior disruptive conduct--that he had been under the influence of a narcotic drug (A 117-A 118; T 446- T 447). Furthermore, counsel's additional offer to have his client bound and gagged should have satisfied the court that there would be no further disruptions. Therefore, under these circumstances, by his now calm demeanor and counsel's assurances and offer to have the appellant bound and gagged, the appellant had reclaimed whatever right to be present he might have lost.

The respondent has relied below on United States v. Munn, 507 F.2d 563 (10th Cir., 1974), for the proposition that despite the mandate of United States v. Allen, 397 U.S. 337, a promise by an excluded defendant to behave if returned to the courtroom does not require the trial court to readmit the defendant if the promise is disbelieved. Two important factors distinguish Munn from the appellant's trial. In Munn, the exclusion was not so complete as for the appellant, since the defendant in Munn could follow the proceedings by a loudspeaker. And the trial judge in Munn disbelieved the defendant's "promise" in part because his own counsel believed that the defendant would try further disruptions.

It is clear, however, that in issuing its order the trial court did not even consider counsel's assertion that the appellant would behave, nor his offer to submit to binding and gagging, since Judge Altimari read from a text prepared before the appellant returned to court with assurances of good conduct. The appellant was excluded a day after the incident without receiving any consideration of his claim that he had regained his right to be present. Exclusion under these circumstances smacked of impermissible punishment of defendant. If the appellant needed to be punished for his prior outburst, contempt would have been a proper response (Mayberry v. Pennsylvania, 400 U.S. 455; see Johnson v. Mississippi, 403 U.S. 212, 214), not the loss of his constitutional rights.

In making this argument the appellant is aware that the New York Criminal Procedure Law §340.50 (3), which provides for exclusion of disruptive defendants, makes no reference to their return. However, due process and the Allen decision itself, which states that the right can be reclaimed as soon as the defendant is willing to conduct himself with decorum and respect, must be read into the statute to make it constitutionally permissible. Cf. People v. Bailey, 21 N.Y. 2d 588. To the extent that the court followed the statute and made no provision for appellant's return until after the witness testified, he was denied his right to due process of law and the right to confrontation.

Furthermore, the rules for conduct of trial courts established by the Appellate Division of the New York State Supreme Court clearly do provide for the return of disruptive defendants once

it is apparent that the disruption has ceased.

> The defendant shall be returned to the courtroom immediately upon a determination by the court that the defendant is not likely to engage in further disruptive conduct. 22 N.Y.C.R.R. §702.2

In its order of exclusion the court did provide that the appellant could re-claim the right to be present, but only after Tamara had testified (A 125; T 454). While it also found that the appellant had intimidated the witness, this finding cannot serve as the basis for his exclusion, for this would be impermissible punishment.

It is clear from Judge Altimari's conduct and comments, that his decision to exclude the appellant from his trial was intended as an accomodation to the complaining witness -- a reason which renders the defendant's exclusion unconstitutional. Such accomodation is not permissible at the expense of a defendant's constitutional right to be present at his trial. Judge Altimari manifested his concern to accomodate Tamara Byrnes in his colloquy with her before her testimony. In chambers, just before excluding the appellant, he asked her, "If your father is present, what is your pleasure? What do you want me to do?" (A 116; T 445). Tamara replied that if her father were in the courtroom she would not go in (A 116; T 445). He later indicated that one reason for his decision to exclude the appellant was that he was concerned that Tamara had in fact been "intimidated." (A 128; T 457).

The court was concerned about "heaping more trauma" upon Tamara (A 115; T 444), but since it had already ruled that she could testify despite the objection of future trauma to Tammy, it is difficult to see how she could be further harmed by testifying

in her father's presence. Whatever harm had been done to Tamara was over and her father's continued presence in the courtroom (properly behaving) could not effect the situation. Even if it is assumed that further protection of the witness from trauma was necessary and proper, complete exclusion of the appellant was unnecessary. Shackling the appellant would have equally protected the witness, and should have relieved so much of her fear as was derived from her father's prior outburst.

Confrontation of an accuser-witness is undoubtedly almost always a highly traumatic experience for a witness. A witness may often be unable to muster the courage to testify because of the embarrasing nature of his testimony (as in rape trials) or fear of reprisals by the defendant (as in trials where the defendant is reputedly a member of organized crime). It may be regrettable that such witnesses refuse to testify altogether, but their reluctance to confront the accused, no matter how reasonable or understandable, does not thereby permit the trial court to deny the defendant his constitutional right to confrontation. Likewise the trial court herein, no matter how sympathetic it may have been to the witness' plight, was not entitled to exclude the appellant in order to accomodate her. It was required to give precedence to the exercise of the appellant's constitutional right of confrontation over the feelings of the witness.

The respondent has attempted to justify the appellant's exclusion on several grounds. He has argued that the trial court's decision to accomodate the reluctance of the witness to testify in her father's presence was justified because that reluctance had been produced by the appellant's own wrongful

behavior. However, there were many reasons why the witness may have felt reluctant to testify besides her father's prior conduct. She was in the middle of a legal proceeding to deny the appellant custody of her (trial transcript page 320). There was a lawyer appearing personally on her behalf to try to prevent her appearance. A physician had testified that it would be psychologically harmful for her to testify (A 65; T 394). She was being asked to speak of distasteful matters that could send her father to prison. What wonder that under all these circumstances, the witness was reluctant to testify? The respondent can no more than speculate that Tamara's statement to Judge Altimari in chambers that she would not testify was due only or principally to the appellant's previous behavior.

The respondent has claimed that the "[p]etitioner admitted that his purpose [behind the outbursts] was to prevent his daughter from testifying," citing page 377 of the trial transcript (A48). However, the record shows that what the appellant was talking about was not his obstreperous conduct in the courtroom, but his recent attempt to commit suicide by taking pills. The appellant even stated a willingness to plead guilty to spare his child the ordeal of a court appearance. Nowhere did he admit that his outbursts were calculated to intimidate her from testifying.

The respondent has also urged that consideration for the maintenance of safety in the courtroom justified the exclusion of the appellant from the courtroom. The cases cited by the respondent do not support this proposition. United States v. Samuel, 431 F.2d 610 (4th Cir., 1970), held that under certain

circumstances, including concern for the safety of those in the courtroom, keeping a defendant handcuffed even in the presence of the jury, might be proper. United States v. Tortora, 464 F.2d 1202 (2nd Cir, 1972), is not relevant because it deals with holding a trial in a defendant's absence when the defendant has voluntarily and without justification absented himself. United States v. Smith, 436 F.2d 787 (5th Cir., 1971), approved a psychiatric examination of a defendant while shackled.

It is apparent that the cited cases merely sanctioned shackling of a defendant, not his exlusion from the courtroom, as a means to preserve the safety of those in the courtroom. Thus, if safety had been a genuine concern for Judge Altimari, and there is no indication in the record that it was, he could have ordered the appellant to be shackled. Indeed, because the appellant specifically requested that he be bound and gagged instead of banished entirely from the courtroom, the court committed constitutional error by refusing to allow the appellant to be present in this manner.

Finally, the appellant contends that the court committed error in rejecting out of hand his assertion that his outbursts had been the result of drugs taken at the jail. Regardless of the court's apparent feeling toward the appellant's conduct, the claim was not patently incredible. An examination at the time as requested by counsel would not have caused any delay in the trial and would have ended any doubts as to the appellant's motivations. It follows, of course, that if the appellant was under the influence of drugs, not only was the exclusion improper

but so was the continuation of the trial. In any event the claim advanced was not an incredible one, so that error was committed in rejecting it out of hand without ordering an additional medical examination.

The respondent has attempted to answer the appellant's argument by stating that the appellant's claims were incredible. The respondent has argued that if the appellant had taken an excessive amount of drugs, he would have fallen asleep. The respondent is not an expert on the effect of drugs and is unqualified to make this assertion. Furthermore, he has not dealt with the thrust of the appellant's argument--that his request was summarily rejected without any consideration by the trial court. There was no probing by the court of the facts of the appellant's condition. Perhaps the condition led him to give an incredible description of what he had done. The court merely relied on its conclusion that the appellant was dissembling in an attempt to delay the trial. Thus, unlike United States ex rel Suggs v. LaVallee, 390 F. Supp. 383 (S.D.N.Y. 1975), cited by the respondent, there was no "evidence" before the court to justify the summary denial of the request by the petitioner's counsel for a medical examination. Without at least some minimal inquiry, the court was unable meaningfully or fairly to rule on the petitioner's request.

POINT TWO

THE COURT SHOULD HAVE PROVIDED THE APPELLANT WITH A MEANS TO HEAR THE TESTIMONY AND ASSIST HIS COUNSEL.

Even if it is assumed that it was proper to restrain the appellant physically from any further outbursts during the testimony of Tamara, there were alternatives available to the court which would have preserved the integrity of the trial without denying the appellant all opportunity to hear Tamara's testimony and render assistance to his attorney. It could have been permitted him to remain in the courtroom while shackled, or it could have removed him from the courtroom but provided him electronic communication so that he could both hear Tamara's testimony and speak with his attorney. The court's failure to employ one of these lesser alternatives was constitutional error.

Trial counsel for the appellant made an impassioned plea that his client at least be allowed to remain bound and gagged with "one hand open" so appellant could write notes during Tamara's testimony (A 119; T 448). While the Court in Allen, supra, indicated reservations about binding and gagging a defendant, it held that such a procedure is constitutionally permissible, and in some situations "binding and gagging might possibly be the fairest and most reasonable way to handle [an unruly] defendant...." Illinois v. Allen, supra, at 344. The New York State Court of Appeals has also approved the use of binding

and gagging of a disruptive defendant. People v. Palermo, 32 N.Y.2d 222 (1973).

The appellant contends that because of the stated need to assist his attorney during Tamara's testimony and his specific request to be allowed to remain bound and gagged, this was precisely the type of case where binding and gagging was indeed the "fairest and most reasonable way to handle" him. The court, however, rejected the appellant's request at least in part because it personally would find it "extremely distastful" to conduct a trial with the defendant bound and gagged (A 95; T 424). Manifestly, a judge's personal sensibilities, no matter how understandable they may be, should give way to a defendant's direct request when his constitutionally guaranteed rights are at stake.

The respondent has urged below that shackling is not acceptable "except in the most extraordinary cases." The appellant submits that his was just such an "extraordinary" case where the court was concerned for order in the courtroom, and the defendant specifically stated his preference for binding and gagging instead of exclusion. If shackling were not appropriate here, when would it ever be appropriate?

The cases cited by the respondent below are authority for the appellant's position -- that in his "extraordinary" case, shackling would have been appropriate. United States v. Samuel, 431 F.2d 610 (4th Cir. 1970), held that handcuffing a defendant during his trial is appropriate under "certain

circumstances." In Kennedy v. Cardwell, 487 F.2d 101 (6th Cir., 1973), the court cautioned that shackling should be a "last resort" and affirmed the conviction of the petitioner therein while shackled. United States v. Ives, 504 F.2d 935 (9th Cir., 1973), did not forbid shackling, since it did not weigh the relative merits of shackling versus exclusion. Furthermore, the rights of the defendant in Ives were more carefully protected than those of the appellant because he was provided with a means of instantaneous electronic communication with the courtroom while excluded.

United States v. Esquer, 459 F.2d 431 (7th Cir., 1972), held that a judge should employ the "least drastic means" to maintain order and approved the shackling of a witness in cases of "extreme need." In the case at bar, because shackling was requested by the petitioner, it would have been the "least drastic means" to keep order. Even if it should be concluded that binding and gagging a defendant in the jury's presence would be prejudicial to him, the defendant with the advice of counsel should be allowed to choose which prejudice he would prefer -- exclusion or shackling.

The second alternative -- providing a means whereby the appellant could have heard the testimony of Tamara and communicated with his attorney, such as by loud speaker and telephone-- would also have met both the court's need to maintain decorum and the appellant's need to assist in his defense. While the appellant's counsel did not specifically request provision of electronic communication, a request for an alternative of this

nature was implicite in his request that the appellant be allowed to hear Tamara's testimony and communicate with his counsel even if gagged and bound (A 119; T 448).

At the time of the appellant's trial, several of the courtrooms in the Nassau County Court House were equipped with microphones and public address systems. It would have therefore been possible within the existing facilities at the Courthouse to arrange for appellant to hear the proceedings by loud speaker, and a telephone connection could have been arranged without any great difficulty.

Under the rules of the Appellate Division of the New York State Supreme Court, the court was obligated to make "reasonable efforts to establish methods of communication linking the defendant with the courtroom while his trial is in progress." 22 N.Y.C. R.R. 702.3. The method of communication provided should be "suitable to the physical facilities of the courthouse and consonant with the goal of providing adequate communication to the courtroom and to defense counsel." (emphasis added) Id. The record reveals that the court made no such "reasonable efforts."

The method actually provided by the court was wholly inadequate to allow the appellant to make any meaningful contribution to his attorney in the conduct of his defense. The appellant's counsel was advised that he could request a recess to communicate with his client during the testimony of Tamara Byrnes, or instruct his assistant to carry messages back and forth (A 125-A 126; T 454-T 455). Such a system of messages or recesses would, of course, not enable the appellant to

follow Tamara's testimony. He therefore would be unable to initiate any suggestions to his counsel based upon his testimony. The most that could happen would be for defense counsel, who was not present during the incidents that were the subject of the testimony, periodically to summarize to the appellant what he felt were significant parts of the witness's testimony. In view of the importance of Tamara's testimony to the case and of defense counsel's plea that the appellant be able to hear the testimony and communicate with him, it is apparent that appellant's counsel was significantly hampered by his client's absence.

It should be noted that the Ninth Circuit has recently spoken with favor about the provision of systems of electronic communication for obstreperous defendants. In United States v. Ives, 504 F.2d 935 (9th Cir., 1974), vacated other grounds, 420 U.S. _____, 95 S.C. 1671, the court felt it "wise" that the trial judge had ordered the installation of special equipment and telephones equipped with flashing lights rather than bells, so that the defendant could hear the trial and communicate with his attorney in the event his behavior mandated his exclusion from the courtroom. Justice Irwin Shapiro in his dissenting opinion in People v. Johnson, 45 A.D.2d 1030 (2nd Dept., 1974), has also urged that it is improper for a court to fail to provide an excluded defendant "mechanical or other arrangements... to hear the testimony of the witnesses." Id. at 1032. In view of the strong concern expressed by defense counsel that

his client be able to participate in defending his case, it would not only have been "wise" to employ a similar system, the court was obligated to try to do so if it would not allow the appellant to remain in the courtroom while bound and gagged.

The respondent has argued below that the trial court bore no duty to provide a means of instantaneous communication for the appellant while excluded. In support of this position, he has cited standards of the American Bar Association, which speak of "extraordinary measures" such as isolation booths. The appellant is not suggesting that the County Court should have employed any "extraordinary measures", rather that the communications systems already available in the Nassau County Courthouse should have been supplied to the appellant. The courthouse had public address equipment already installed. All that would have been required would have been to install connecting wires to the room where the appellant was being kept. Likewise, there would have been nothing "extraordinary" about installing a telephone linkage. Therefore, it cannot be fairly argued that the appellant was asking the County Court to expend either exceptional financial or administrative resourses in order to allow him to participate effectively in his defense. In view of the importance of the constitutional right at stake, the trial court had a duty to undertake these minimal efforts to allow the appellant to participate in his defense effectively.

POINT THREE

THE APPELLANT HAS EXHAUSTED ALL REMEDIES AVAILABLE TO HIM IN THE STATE COURTS

The appellant has explicitly and fully raised the issues herein both on direct appeal [People v. Byrnes, 40 A.D.2d 941 (1972); aff'd 33 N.Y.2d 343 (1974)] and in his motion in the Nassau County Court to vacate judgment. Relevant potions of the appellant's brief filed in the New York State Court of Appeals and of the moving papers filed in support of his motion to vacate judgment in the Nassau County Court are attached hereto as pages A4 through A25 of the appendix.

The respondent urged below that the appellant in his motion to vacate judgment failed to raise the specific issue which Judge Weinstein found in the appellant's previous application for a writ of habeas corpus had not been ruled upon by the courts of New York, to wit: "did the trial court exclude the defendant on an assertedly improper basis?" In fact, this issue was the very essence of the appellant's motion to vacate judgment in the Nassau County Court. The appellant stated the grounds for the relief sought on page two (A15) of his affidavit in support of the motion as follows:

> Defendant moves to vacate the judgment of conviction under which he is presently incarcerated on the ground that he was excluded from his trial during that portion when testimony was given by his daughter Tamara Byrnes in order to accomodate the witness and to punish the defendant for his prior disorderly behavior in the courtroom. Exclusion for these purposes violated the defendant's

> right to confrontation guaranteed by the Sixth Amendment of the United States Constitution. The defendant raised the issue of the reason for his exclusion as one of the points in his appeal to the Appellate Division and the Court of Appeals (Point Two in Appellant's brief to the Court of Appeals). However, the appellate courts failed to deal with defendant's specific claim that he had been excluded from the courtroom as an accommodation to the witness, who told the Court she would not testify if defendant was present, and punishment for the defendant. Defendant, therefore, brings this motion to vacate judgment in order to obtain review of the reason for his exclusion from his trial by Judge Altimari. [emphasis supplied].

The respondent also urged below that the appellant raised "for the first time in any court, an entirely new issue -- whether petitioner was denied due process by the Court's refusing to order a medical examination when petitioner had asserted he had taken some pills...and was incoherent." This issue was explicitly argued to the New York State of Appeals at pp. 21-22 (A11-A12) of the appellant's brief to that court. It was again presented in substantially the same terms in his motion to vacate judgment at page 11 of his affidavit (A24) in support of that motion. As the respondent noted below, a request for a medical examination of the appellant was made during the trial (A48; T377) but summarily rejected by the court (A49; T378). There is therefore no question that the appellant has exhausted all state remedies whereby the specific claims raised herein could be reviewed.

In the proceeding below, the District Court agreed with the appellant's contention that he had exhausted his state remedies, as it denied the petition on its merits and did not deal with the issue of exhaustion of state remedies.

POINT FOUR

THE DISTRICT COURT WAS NOT BOUND BY THE CONCLUSIONS OF THE STATE COURTS

The respondent has urged below that the federal courts should not entertain the appellant's habeas proceeding because the state courts have already considered and rejected his argument "...that the exclusion was an accomodation to the witness and an impermissable punishment for his prior disruptive behavior...." In support of this thesis the respondent has cited Townsend v. Sain, 372 U.S. 293 (1963),and LaVallee v. Delle Rose, 410 U.S. 690 (1973). This thesis is unsound for two reasons. First, the respondent is taking a position inconsistent with his argument below that the appellant has failed adequately to raise the issue raised herein in the state courts and hence has not exhausted his state remedies. If the appellant's claims were in fact considered in the Court of Appeals, then he has exhausted his state remedies.

Second, Townshend v. Sain, supra, and LaVallee v. Delle Rose, supra, do not support the respondent's position. Both cases deal with the holding of a "full and fair evidentiary hearing in a state court," Townshend v. Sain, supra, at 312. There has been no evidentiary hearing of any sort in the appellant's case dealing with the reasons for his exclusion from his trial. Even when there has been such a hearing, a federal court in a habeas corpus proceeding is not precluded from reviewing the findings of the state hearing. Rather, the burden then shifts to the petitioner to establish that the state court's determination was erroneous. Lavallee, supra.

There have been no findings of fact made by the state courts regarding the reasons for the appellant's exclusion. The state courts have merely reviewed the record of the trial and apparently concluded that under the facts manifest in the record no reversible error was committed. In the instant proceeding the appellant is relying on the record and is asking this court to determine as a matter of law whether under the totality of circumstances, his exclusion from the courtroom met constitutional standards. Such a review of the adequacy of a state court adjudication of a constitutional claim is well within the review powers of a federal court in a habeas corpus proceeding. Fay v. Noia, 372 U.S. 391 (1963). In Fay the court held that

> "the state adjudication carries the weight that federal practice gives to the conclusion of a court. . . of another jurisdiction on federal constitutional issues. It is not res judicata."..."No binding weight is to be attached to a State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on a fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."...

Thus, review of the record of the appellant's trial to evaluate his claim that his exlcusion from the courtroom violated his constitutional rights is well within the jurisdiction of the federal courts in a habeas proceeding.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, ex rel THOMAS F. BYRNES

Petitioner-Appellant

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility

AFFIDAVIT OF SERVICE BY MAIL

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Susan Briggs being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above named ~~defendant~~ THOMAS F. BYRNES herein. That she is over 21 years of age, and resides at Mineola, New York. That she served the within Brief and Appendix on the 21st day of October 1975 upon Louis J. Lefkowitz, Attorney General, State of New York, 2 World Trade Center, New York, New York

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Susan Briggs

Sworn to before me this
21st day of October, 1975

LORRAINE C. PAPAS
Notary Public, State of New York
No. 30-4501796
Qualified in Nassau County
Certificate filed in Nassau County
Commission Expires March 30, 1977

CONCLUSION

FOR THE ABOVE STATED REASONS THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS.

Respectfully submitted,

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